(2)

No. 09-1105

IN THE

Supreme Court of the United States

AIG BAKER STERLING HEIGHTS, L.L.C.,
A.B. OLATHE II LIMITED PARTNERSHIP,

Petitioners,

v.

AMERICAN MULTI-CINEMA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 13 of the Federal Arbitration Act treats a court's order confirming an arbitration award the same as any other judgment and subjects it to "all the provisions of law" relating to a judgment. The District Court gave AMC credit for a portion of the arbitration award it had already paid pursuant to Federal Rule of Civil Procedure 60(b)(5), which allows a court to give relief when a judgment has been "satisfied, released or discharged." The Eleventh Circuit affirmed, relying on § 13 and avoiding any conflict with FAA §§ 10 and 11. Should this Court grant review, when the Eleventh Circuit did not decide the question framed in the petition and, in any event, the decision below is consistent with the express terms of the FAA?

Corporate Disclosure Statement

The parent company of Respondent, American Multi-Cinema, Inc., is AMC Entertainment Inc. No publicly held company owns 10% or more of the stock of American Multi-Cinema, Inc.

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INTRODUCTION

If a party arbitrates a dispute, loses, and then pays the arbitration award, the dispute is resolved outside the courts. Nonetheless, a ruthless adversary can go to federal court and get a judgment confirming the arbitration award. *See* 9 U.S.C. § 9. The adversary could then use that judgment to garnish the party's bank accounts and obtain liens on the party's property in any federal district in the country, notwithstanding that the party already paid the award.

This is such a case. Petitioner AIG Baker Sterling Heights is attempting to enforce part of an arbitration award that Respondent American Multi-Cinemas has already paid. Recognizing the inequity of AIG Baker's pursuit and the undisputed evidence that AMC paid nearly $250,000 of the award at issue, the District Court granted AMC's motion for relief from the judgment confirming the arbitration award under Rule 60(b)(5). The Eleventh Circuit's decision is well grounded. The Federal Rules of Civil Procedure "govern proceedings" in arbitration except as provided otherwise in the Federal Arbitration Act. Fed. R. Civ. P. 81(a)(6)(B). The FAA does not provide otherwise. In fact, it explicitly states that a federal court's judgment on an arbitration award "shall have the same force and effect" and is "subject to all the provisions of the law" relating to a "judgment" in a civil action. 9 U.S.C. § 13. And Rule 60(b)(5) provides the district court the authority to relieve a party from a final judgment where "the judgment has been satisfied, released or discharged." The decision below thus vindicates a district court's control over its own judgment, control that was

traditionally wielded by federal courts at common law and that Congress specifically provided in § 13 of the FAA.

This Court should deny certiorari. The Eleventh Circuit did not decide the question that AIG Baker asks this Court to review. Contrary to the question presented, the Eleventh Circuit did not permit the District Court to alter an arbitration *award* using Rule 60(b)(5). Instead, it affirmed the District Court's application of Rule 60(b)(5) under FAA § 13 to alter its own *judgment*. The case is more than a poor vehicle; the question is simply not presented. Moreover, AIG Baker's primary argument alleges mere error. But that argument overlooks the Eleventh Circuit's distinction between FAA §§ 10 and 11, which limit the grounds for vacating or modifying an arbitration award, and § 13, which gives the court full control over its own judgment. AIG Baker's secondary argument alleges a circuit split based on circuit decisions that do not involve Rule 60(b)(5) or § 13. A more complete analysis of circuit law shows that while Rule 60(b) cannot be used to modify the arbitrator's award, it can be used to alter the court's own judgment. There is no disagreement in the circuits on that issue. That issue, which the Eleventh Circuit correctly decided, does not warrant this Court's review.

STATEMENT OF THE CASE

The underlying dispute concerns property taxes on movie theatres. AMC owns movie theatres located in shopping centers. AIG Baker owned the shopping centers that housed two of AMC's movie theatres, one near Detroit and one in a Kansas City suburb. App. 2a. Under the terms of the two leases, AMC (along with the shopping center's other tenants) would pay its share of the shopping center's real estate taxes to AIG Baker, who in turn was obligated to pay the taxes for the entire shopping center directly to the taxing authority. *Id.* AMC suspected that AIG Baker had been overcharging AMC for its share of property taxes at the two shopping centers. App. 28a. The specific dispute centers on taxes due for the first half of 2002 on the Kansas City theatre, called the Olathe property. *Id.* AIG Baker sold the Olathe shopping center in 2002. App. 3a. The closing of that transaction was conditioned on AMC and AIG Baker resolving their tax dispute. Doc. 1 Ex. A at 2.

AMC and AIG Baker signed an agreement to arbitrate the tax dispute. App. 2a. With respect to the Olathe property, they asked the arbitrators to decide (1) What amount of taxes are "properly payable by AMC to Olathe Landlord under the terms of the Olathe Lease"?, (2) What amount of taxes was "previously paid by AMC to Olathe Landlord"?, and (3) What amount of taxes are "presently owing by AMC to Olathe Landlord or by Olathe Landlord to AMC?" Doc. 1 Ex. A at 2; App. 7a n.3. The sale of the Olathe property closed on June 28, 2002. App. 29a. Because property taxes were paid twice a year in arrears, AIG Baker had paid no taxes on the Olathe property at the time of the sale. Doc. 26

England Decl.; *id.* Rusche Decl. AIG Baker admitted that it "had no tax liability" for 2002 on the Olathe property "at the time of the arbitration." Doc. 42 Attach. at 1.

The arbitrators ultimately decided "[w]hat is the correct amount of tax owed by AMC . . .?" Doc. 1 Ex. B at 3. Specifically, the arbitrators found the dispute involved "which method or formula is appropriate for calculation of real estate taxes." *Id.* at 2. The arbitrators then resolved which formula should be applied and determined the correct amount AMC owed for each property for each tax year in question. *Id.* at 4. They then deducted the amount AMC had previously paid AIG Baker to calculate the net balance due from AMC. *Id.* at 5. The arbitrators decided that AMC owed $226,771.76 for its share of the 2002 taxes due on the Olathe property. *Id.* And based on a joint stipulation stating, correctly, that AMC had paid "$0" in taxes "to [AIG] Baker" for 2002 taxes on the Olathe property (Doc. 13 Ex. B at 6–7), the arbitrators held that AMC was liable for the full amount of $226,771.76. App. 3a, 28a n.1.

After arbitration, AMC discovered that it had paid the 2002 taxes on the Olathe property directly to the taxing authority. Doc. 26 England Decl. The new landlord had received the tax bill after the sale and asked AMC to pay the taxes directly. *Id.* Rusche Decl.; App. 3a, 40a–41a. AMC discovered this payment as it was preparing to pay the arbitration award, so it deducted the 2002 taxes it paid from the amount tendered to AIG

Baker to satisfy the arbitration award. Doc. 40 Ex. B. Surprisingly, AIG Baker refused AMC's tender, taking the position that AMC must pay the entire arbitration award of $866,425.18 before it would discuss whether AMC was entitled to credit for the 2002 tax payment. *Id.* All the litigation that followed resulted from AIG Baker's refusal of AMC's tender and its insistence that AMC pay the entire award. The inequity of AIG Baker's position is apparent, considering that AIG Baker had no tax liability for the property it sold in 2002, before the tax bill issued, and that AMC's payment relieved AIG Baker's tax liability after the sale. *See* App. 41a ("AIG Baker never paid that amount and does not owe those taxes.").

As recounted in the Eleventh Circuit's decision, the parties then filed competing motions in federal court to confirm or modify the arbitration award. App. 3a. Ultimately, the District Court confirmed the $866,425.18 arbitration award in full. App. 7a, 14a.

AMC then filed a motion under Rule 60(b)(5) seeking credit for that portion of the court's judgment that had been "satisfied, released or discharged." App. 31a–32a. Notably, AMC's motion did not contradict its stipulation that it had paid AIG Baker $0 in taxes for 2002, nor did it seek to vacate or modify the amount of taxes the arbitrators decided was owed. App. 32a. AMC submitted the following evidence: (a) the tax bills for the first half of 2002 on the Olathe property, (b) its cancelled checks paying the tax bills directly to the Kansas taxing authority, (c) receipts from the taxing authority, (d) affidavit testimony that Baker paid no portion of the

2002 taxes, and (e) proof that its payment reduced AIG Baker's tax liability, dollar for dollar. App. 11a & n.5, 43a–44a. AIG Baker did not submit any evidence in opposition to these facts. App. 11a n.5.

The District Court granted AMC's Rule 60(b)(5) motion and gave it credit against the judgment for the taxes it had paid directly. App. 16a–17a. Notably, the court did not vacate or alter the amount of 2002 taxes the arbitrators found AMC owed on the Olathe property. App. 7a n.3. Instead, the court simply gave AMC credit for $226,771.76, the exact amount of 2002 taxes awarded by the arbitrators, plus interest. App. 12a n.6, 17a. The court found the evidence of AMC's payment was "unrefuted." App. 11a, 43a.

The Eleventh Circuit affirmed. App. 13a. Noting that AMC submitted "conclusive evidence" showing it paid the 2002 taxes "directly to the taxing authority," the Court concluded that AMC had satisfied that portion of the judgment, warranting relief under Rule 60(b)(5). App. 12a. The Court observed that AIG Baker "never contradicted the evidence of payment or denied that the tax payment satisfied the obligation Baker would have otherwise had to pay to the taxing authority." App. 13a. The District Court thus did not abuse its discretion in preventing AIG Baker from receiving "a quarter-of-a-million dollar windfall." App. 11a.

Reasons for Denying the Petition

I. The Eleventh Circuit did not decide the question presented.

AIG Baker's petition asks the wrong question. It asks this Court to review whether Rule 60(b) can be used to circumvent §§ 10 and 11 of the FAA, which set forth the bases for vacating or modifying an arbitration award. Pet. i.

But the Eleventh Circuit did not decide that question. In the Court's words, "We do not see . . . how those FAA sections control in the circumstances of this appeal: the district court neither vacated nor modified the arbitration award." App. 7a. Instead, the Court turned to § 13 of the FAA, which "says that a judgment confirming an arbitration award, once entered, has the same force and effect as a judgment in a standard civil action and *is subject to all the provisions of law relating to those judgments*." App. 8a (citations omitted). Rule 60(b) is among those "provisions of law." *Id.* Because the District Court confirmed the arbitration award in full and thereafter granted AMC "some relief from the judgment under Rule 60(b)(5)," the Court held §§ 10 and 11 "say nothing about court judgments and do not control this appeal." App. 7a–8a.

Thus, if the Court were to grant review on the question presented by AIG Baker, it would have no impact on this case. Even if this Court were to hold that Rule 60(b) does not permit a court to award relief foreclosed by FAA §§ 10 and 11 (as the question presented (App. i) suggests), the outcome would not

change. The Eleventh Circuit acknowledged that courts may not be able to "use Rule 60(b) to modify or vacate an arbitration award or, perhaps, to grant relief from a judgment confirming an award for reasons covered in sections 10 or 11 of the FAA." App. 8a n.4. "This appeal is different, however." *Id.* It does not concern use of Rule 60(b) to vacate or modify an arbitration award; "it is about partial payment of a judgment debt." *Id.*

This Court should deny cert on this ground alone. This Court does not decide "issues not decided below." *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 168–69 (2004).

II. The Eleventh Circuit's decision is consistent with the FAA.

The decision below is also consistent with the FAA. Arbitration awards are not self-enforcing. *See Drake Bakeries v. Local 50, Am. Bakery & Confectionary Workers Int'l*, 370 U.S. 254, 268 (1962) (Harlan, J., dissenting). If a party wants judicial enforcement, it must move in federal court for an order confirming the award. 9 U.S.C. § 9. Once confirmed, the judgment entered has "the same force and effect" as a judgment in a civil action, "and it may be enforced as if it had been rendered in an action in the court in which it is entered." *Id.* § 13.

Federal judgments are powerful things. Once entered, a judgment becomes a lien on the judgment debtor's property in the district. 28 U.S.C. § 1962. The judgment can also be registered in any other federal district where the judgment debtor has property.

Id. § 1963. And it can be enforced through garnishment or condemnation proceedings under Federal Rules of Civil Procedure 69 and 71.1.

Given the inherently coercive nature of a judgment, § 13 of the FAA also provides that any judgment confirming an arbitration award shall be "subject to all provisions of law relating" to "a judgment in an action." This expressly includes the Federal Rules of Civil Procedure, which are also made applicable to FAA proceedings under Rule 81(a)(6)(B). Rule 60(b)(5) is one of the "provisions of law relating to[] a judgment" incorporated by § 13. That rule—which finds its roots in the common law power of courts over their own judgments under bills and writs of *coram nobis*, *coram vobis*, and *audita querela*—authorizes a court to relieve a party from a final judgment when "the judgment has been satisfied, released or discharged."

The Eleventh Circuit properly applied FAA § 13 and authorized the District Court to give AMC credit for payment of part of the judgment under Rule 60(b)(5). The Court stressed that the District Court did not use Rule 60(b)(5) to vacate or modify the arbitration award. App. 7a & n.3. Rather, the District Court merely gave AMC credit for partial payment of a judgment. *See* App. 12a n.6. Based on the "unrefuted evidence" of payment directly to the taxing authority, the Court held that AMC had "already satisfied some of the judgment against it and, therefore, was entitled to some relief under Rule 60(b)(5)." App. 11a. That holding is entirely consistent with § 13's incorporation of the law governing judgments.

AIG Baker argues that the Eleventh Circuit's decision is inconsistent with *Hall Street Associates v. Mattel*, 552 U.S. 576 (2008). Pet. 18–22. But the Eleventh Circuit distinguished *Hall Street* as a decision concerning FAA §§ 10 and 11, not § 13. App. 7a–8a. Because the District Court "neither vacated nor modified the arbitration award," §§ 10 and 11 "do not control this appeal." Instead, § 13 controls, giving the trial court the power under Rule 60(b)(5) "to declare a judgment satisfied when damages are paid before trial or a tortfeasor or obligor has paid the judgment debt." App. 9a (internal quotation and citation omitted). The Eleventh Circuit's decision thus does not conflict with *Hall Street*. Even if it did, certiorari would not be warranted to review that error. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

The Eleventh Circuit's decision also sets the right precedent. Under AIG Baker's theory, a party in AMC's position could receive an adverse arbitration award, pay it, but nonetheless face a federal judgment for the same amount obtained by a vindictive opponent. That is exactly what occurred here. Notwithstanding AMC's payment directly to the taxing authority on taxes AIG Baker did not pay on property it no longer owned, AIG Baker sought to enforce a federal judgment against AMC for the same amount. The District Court said it had never seen anyone "so obstinate about trying to collect money that . . . they shouldn't be collecting." Doc. 38 at 30. Section 13 of the FAA prevents such mischief. Once a court enters judgment on an arbitration award, the court assumes control over the judgment itself and

can give credit if the judgment has been "satisfied, released or discharged." FED. R. CIV. P. 60(b)(5). This result counters the inequity of AIG Baker's position and discourages others from similar conduct once an arbitration award is paid.

III. The circuits are not split on the question presented.

AIG Baker also alleges a 3-1 circuit split, with the Eleventh Circuit purportedly opposed to the D.C., Fourth, and Ninth Circuits. Pet. 22–26. The D.C. Circuit case it cites is nearly 40 years old. The Fourth Circuit case is unpublished. None of the cases applies Rule 60(b)(5) under similar circumstances. AIG Baker has not cited any circuit decision directly contrary to the decision below. The split is fabricated, not real.

A deeper analysis of circuit-level precedent reveals the law is uniform on the question the Eleventh Circuit actually decided. The Ninth and D.C. Circuits agree—consistent with the terms of FAA § 13—that a district court has authority under Rule 60(b) to grant relief from the court's own judgment on an arbitration award. *See Fidelity Fed. Bank v. Durga Ma Corp.*, 387 F.3d 1021, 1023 (9th Cir. 2004); *Balta Air Lines v. Transaction Mgmt.*, 98 F.3d 640, 642 (D.C. Cir. 1996). The Eleventh Circuit expressly relied on this line of cases. App. 8a.

A separate line of cases from those same circuits, plus the Fourth Circuit, recognizes—consistent with FAA §§ 10 and 11—that a district court does not have authority under Rule 60(b) to vacate or modify an

arbitration award. *See E.Spire Communications v. CNS Communications*, 39 Fed. Appx. 905, 911–12 (4th Cir. 2002). *Lafarge Conseils Et Etudes v. Kaiser Cement & Gypsum*, 791 F.2d 1334, 1338–39 (9th Cir. 1986); *Washington-Baltimore Newspaper Guild v. Washington Post*, 442 F.2d 1234, 1238–39 (D.C. Cir. 1971).

These two lines of precedent do not conflict. They reflect the distinction between vacating or modifying an arbitration award itself, which §§ 10 and 11 strictly limit, and granting relief from the Court's own judgment, which § 13 leaves unfettered. The District Court and the Eleventh Circuit correctly relied on this distinction to grant AMC relief from the judgment. App. 7a–8a, 35a–37a. Circuit law is in complete harmony with this result. Certiorari review is not warranted.

Conclusion

This case does not satisfy any requirement for certiorari. The Court should deny the petition.

Respectfully submitted,

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